JUDICIAL GOVERNMENT

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I

INTRODUCTION

Governance is a low profile activity within the judiciary. Judges are reluctant to exercise authority over each other outside the realm of appeals; they value decentralization, local autonomy, and ample room for individual initiative in the organization of their work.[1] Judicial independence means not just freedom from control by other branches of government, but freedom from control by other judges. The ideal of autonomous judges, with roots deep in American legal culture, powerfully influences contemporary debates about efficiency and accountability within the judiciary.

The preference for administrative independence is particularly strong in the federal court system. The institutions that Congress has established to facilitate communication and policymaking within the federal courts—chief judgeships, circuit councils, circuit conferences, and the Judicial Conference of the United States—are active in communicating the needs of the judiciary to others, but these institutions are reluctant to plan, coordinate activities, and set and enforce administrative policy. Congressional prodding was required, for example, to force the circuits to democratize their governing councils and to implement systematic review of complaints over judicial misconduct and disability.[2]

The purpose of this article is to evaluate the federal system of governance and administration and to speculate about its likely future. The federal system relies upon circuit governments, each virtually independent of the

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1. This is not to suggest that appellate review plays no role in matters of administrative policy, but only that this role is sharply constrained by the case-specific format of review. *See, e.g.*, Dunbar v. Triangle Lumber, 816 F.2d 126 (3d Cir. 1987), in which the Third Circuit Court of Appeals set forth standards for dismissals for failure to prosecute.

2. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 2, 94 Stat. 2035 (codified at 28 U.S.C. § 332(a)(1)(c) (1982)), mandated representation of district judges. The requirement and implementation by the circuits is discussed *infra* at pp. 94-99.

others, but under some direction from the center. The system is currently under attack from both inside and outside the judicial branch. Judicial officers at the bottom of the federal hierarchy express resentment at being excluded from circuit deliberations. Outside the judiciary, Congress and other institutions that work with the courts are concerned that the circuits do not take sufficient responsibility for holding down costs, for controlling misconduct in the ranks, and for reducing delay.

In an effort to elucidate this debate, this article focuses on the Ninth Circuit, which has gone furthest in implementing democratic, participatory, active governance. The complexity of the subject of judicial governance necessitates such a strategy of selective investigation. This approach is also defensible in its own right because the inherent strengths and limitations of circuit governance are most evident in the areas where it has been most carefully nurtured.

The Ninth Circuit is the largest circuit in the federal system in terms of geographical size, population, caseload, and number of judges. The circuit is made up of nine states, and its borders range from the Arctic Circle to Mexico and from the Rockies to the Pacific Trust Territories. One-sixth of all federal judicial officers work in the Ninth Circuit. The circuit has a staff of over 3000 and an annual budget of $200 million. Civil filings and terminations in the circuit's fifteen district courts approximate 38,000 annually; bankruptcy court filings are nearly 150,000 annually; the court of appeals handles between 5000 and 6000 cases each year. Talk of splitting the circuit, not surprisingly, has been common for at least twenty years.[3]

The survival of the Ninth Circuit has depended on a combination of inertia, a favorable political climate, and a degree of circuit-minded leadership and organization that is unique in the federal system. Judge James R. Browning, Chief Judge of the Ninth Circuit from 1976 to 1988, was an innovator in case management and the principal architect of the Ninth Circuit experiment in self-governance. Attention to matters of governance was necessary, Browning reasoned, to ensure that new ideas would be implemented successfully, to maintain esprit de corps, and to help protect the circuit from division. Aided by an unusually long term of office and a talented staff, Browning created a multi-layered, broadly based system of governance designed to promote consensus and to permit decisive action.

How authoritative has government actually proven to be in the Ninth Circuit? How authoritative should government be when many citizens of the polity are article III judges? How much autonomy, for example, is appropriate for district courts (or individuals within these courts) in tailoring procedures to local needs and personal preference? Who should define the relationship between article III and non-article III judicial officers? More

3. Similar talk in the Fifth Circuit resulted in a split. The politics of dismemberment and the capacity of circuit institutions to respond to external initiatives of this sort are explored in D. BARROW & T. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1988).

generally, what does the Ninth Circuit experience teach about the capacity of circuit government to achieve legitimacy within the circuit and accountability beyond the circuit?

This article is divided into three parts. The first explores the concept of circuit self-government initiated by Congress in 1939 and implemented by the federal judiciary in the decades that followed. The second concerns the effort to make Ninth Circuit governing institutions more democratic and forward-looking. The theme of the third part is evaluation; interviews with members of the Ninth Circuit community, observation of governing institutions at work, and analysis of internal court documents suggest the capacities of the current system of circuit government.[4]

It should be noted at the outset that the language of governance invoked here suggests a set of concerns derived from experience in more familiar political settings. The terminology encourages the reader to think in terms of policymaking by duly selected agents, mechanisms for enforcing the policy choices, a community linked by common concerns, and citizenship within that community. Accountability, access, and participation are values relevant to assessing governing institutions, and the Ninth Circuit has taken these values into account in designing its governing institutions.

The circuit has not, however, embraced those aspects of democratic governance associated with mobilizing citizen interest and defining political issues: campaigning, partisanship, and the development of political platforms. These activities, so familiar in less constrained political settings, seem anomalous in a judicial polity. The Ninth Circuit's version of organizational democracy, however robust against the backdrop of the judiciary, inevitably seems bloodless against the backdrop of political life in the larger community. The very imagery that justifies the circuit's movement toward democracy thus points to certain tensions in the concept when it is applied to a judicial setting.

II

INSTITUTIONAL ACCOUNTABILITY: FINDING A ROLE FOR THE CIRCUIT

The current system of governance within the federal courts took shape with the adoption of the Administrative Office Act of 1939.[5] The impulse for broad institutional reform came from many sources, including President Franklin Roosevelt, who had an agenda for improving the administration of the federal courts.[6] The 1939 legislation provided the federal court system

4. For details of the interviews, see *infra* note 76. Many of these interviews were conducted with the understanding that the speaker would remain anonymous. Consequently, not all statements quoted in this article are attributed to the speaker.

5. Ch. 501, 53 Stat. 1223 (current version at 28 U.S.C. § 332 (1982)).

6. P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 112-16 (1973). Roosevelt's plan for increasing the membership of the Supreme Court is better known, but his ideas for improving the courts extended to the rest of the federal court system as well. He recommended the establishment of a proctor who would help the Supreme Court play an active role in administering the system. Judges would be made available for service wherever needed, for example. *Id.* at 116. This plan was unpopular at every level in the federal judiciary, including the U.S. Supreme Court. *Id.*

with its own agency, the Administrative Office of United States Courts, which assumed administrative functions previously performed by the Department of Justice. The Administrative Office was to take its direction from the Judicial Conference of the United States, a body at that time headed by the Chief Justice of the United States and made up of the senior (now chief) judge from each circuit.

The framers of the 1939 law envisioned a significant regional dimension in the overall scheme of government. Problems arising in the districts would be resolved at the circuit level, and grassroots ideas for reform would be debated in the circuits first.[7] The senior judge of each circuit would communicate the region's concerns and ideas to institutions at the national level and assist the circuit in implementing national policy. Giving the circuits a significant role in governance was a strategy for satisfying demands for a more accountable system while avoiding centralized control based in the U.S. Supreme Court or in a Washington bureaucracy.

The legislation set up two forums for communicating, clarifying, and resolving administrative problems at the circuit level: an annual conference of bench and bar, and a council composed of members of the court of appeals and headed by the senior judge of that court. Some of the circuits had already instituted similiar conferences on an informal and irregular basis.[8] In an effort to ensure that these gatherings were more than purely social events, the 1939 law specified that the conferences be devoted to "considering the state of the business of the courts and advising ways and means of improving the administration of justice within the circuit."[9]

Actual policymaking was to occur in the circuit councils. A number of specific duties were mandated, as well as the general purpose of ensuring that "the work of the district courts shall be effectively and expeditiously transacted."[10] District judges were required to "promptly carry out the direction of the council as to the administration of the business of their respective courts."[11]

With the encouragement of the Judicial Conference, Congress built upon this foundation in subsequent legislation, adding tasks for the councils beyond those outlined in the 1939 law. The Federal Magistrates Act of 1968,

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at 119. The Justices of the Supreme Court, particularly Chief Justice Hughes, did not want the job of administrator-in-chief. *Id.* at 137-38.

7. *Id.* at 145-65.

8. *Id.*

9. Administrative Office Act, ch. 501, § 307, 53 Stat. 1223, 1225 (1939) (current version at 28 U.S.C. § 333 (1982)).

10. Administrative Office Act, ch. 501, § 306, 53 Stat. 1223, 1224 (1939) (current version at 28 U.S.C.A. § 332(d)(1) (West Supp. 1989)). The 1948 revision of the Judicial Code strengthened this language to read: "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." Act of June 25, 1948, ch. 646, § 332, 62 Stat. 902, 902 (codified as amended at 28 U.S.C.A. § 332(d)(1) (West Supp. 1989)).

11. Act of June 25, 1948, ch. 646, § 332, 62 Stat. 902, 902. The section was amended by Act of Oct. 15, 1980, Pub. L. No. 96-458, § 2, 94 Stat. 2035, 2035 (codified at 28 U.S.C. § 332(d)(2) (1982)), to read: "All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council."

for example, requires the circuit councils to recommend when full- and part-time magistrates are needed.[12] The Judicial Conference relies on these evaluations in its own recommendations to Congress.[13] The clear intent, in the words of the leading historian of these developments, was to make the councils "the cornerstone of the federal judiciary's administrative institution."[14]

A. Ambiguities in Regional Authority

The activities of the councils were the subject of congressional reconsideration in 1978. In his testimony, Judge J. Clifford Wallace provided a useful summary of council responsibilities as of that time:

> [The councils first] approve plans of the district courts for jury selection, counsel appointed under the Criminal Justice Act, and speedy trial compliance; . . . [second, they make] certain housekeeping approvals, such as the place to keep records, court quarters, designation of residence of a district judge, pretermission of a regular session of court, and staffs of senior judges; [third, they] approve the selection of and salaries of public defenders; [fourth, they] recommend numbers and salaries of magistrates and bankruptcy judges; [fifth, they] issue a certification of physical or mental disability of a judge; [sixth, they] make decisions when district judges cannot agree on rules, magistrates to be selected, or recommendations on salary.[15]

This summary suggests considerable council authority to affect the conditions of adjudication within the circuit, but no orientation toward planning, mobilizing for change, or mandating improvements in the way judges administer their courts. It is unclear how far the drafters of the 1939 legislation expected the councils to go in these directions. The Federal Rules of Civil Procedure, promulgated in 1938, were also silent on just how the new national policy of uniform rules was to coexist with the tradition of localism and personal idiosyncracy in federal court administration.[16] The Federal Rules allow (but do not require) rulemaking at the district level, and permit

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12. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified in scattered sections of 18 & 28 U.S.C. (1982)).

13. 28 U.S.C. § 633(b) (1982 & Supp. V 1987). See also the provisions of the Criminal Justice Act of 1964 referring to district court procedures for providing representation to indigent defendants, Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A (1982 & Supp. V 1987)), and the section of the Jury Selection and Service Act of 1968 which provides for the selection of grand and petit jurors by the district courts, Pub. L. No. 90-274, § 1863(a), 82 Stat. 53, 54 (codified as amended at 28 U.S.C.A. § 1863(a) (West Supp. 1989)). In each case the council reviews the district court's plans for conformity with statutory requirements. These specific grants may be redundant in light of the broad grant of authority over district court administration provided in 28 U.S.C. § 332. *See* P. FISH, *supra* note 6, at 397-99.

14. P. FISH, *supra* note 6, at 165. Elsewhere, Fish states that "the framers of the 1939 Act intended the councils as the administrative linchpin of the federal judiciary." *Id.* at 387.

15. *Judicial Discipline and Tenure: Hearings on S. 295, S. 522, and S. 678 Before the Subcomm. on Improvements in Judicial Machinery and the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 37 (1979) (statement of Judge J. Clifford Wallace). Council duties have grown since then. *See, e.g., infra* p. 102, discussing the council's new oversight responsibilities with respect to local rules.

16. The Federal Rules of Civil Procedure represented a truly radical break with tradition and prior law, which had prescribed that the federal courts should model their local rules to conform to court rules in their own localities. *See* C. Seron, The Limitations of Standardizing Judge's Practices 7-13 (unpublished manuscript).

individual judges considerable latitude to experiment with procedures. Federal Rule of Civil Procedure 16 exemplifies the approach; it offers a catalogue of options for district judges who seek to streamline trials or facilitate settlements.[17]

Nevertheless, circuit governance must have disappointed some of its earliest proponents. In the 1940's and 1950's, a number of circuits either did not even convene the required conferences, or held only pro forma gatherings.[18] The councils likewise failed to do more than the minimum required by law. Conceived without power to subpoena witnesses, without significant staff support, and without clear-cut sanctioning authority, the councils appear to have been unprepared to move forcefully against errant judges or to take on other difficult regulatory tasks.[19]

Some of these deficiencies were remedied over the course of years, but there were no dramatic changes in the character of council activity. The councils gained the power to require the attendance of witnesses with the adoption of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.[20] This Act was designed to encourage circuit councils to deal more vigorously with the problem of judicial misconduct.[21] By that time the circuit councils had also acquired more staff support. In 1971 Congress created the position of circuit executive and authorized the executive, subject to council guidance, to arrange for and attend council meetings, to conduct studies, and to prepare reports for the council.[22]

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17. The tendency has been to interpret these sections expansively, and to find in the common law additional rationales for leaving district judges to their own administrative devices. *See, e.g.*, Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 527 (1986).

18. R. Wheeler, Federal Circuit Judicial Conferences: Changing Format and Changing Role 6 (Mar. 15, 1982) (unpublished manuscript on file at the Federal Judicial Center).

19. Fish suggests that the expectation of the framers was that judges would be motivated to behave appropriately by virtue of their internalization of professional norms and dread of rejection by their professional peers. P. FISH, *supra* note 6, at 161-62. Steven Flanders and John McDermott concluded that this approach worked "fairly well" after they interviewed judges and court personnel in every circuit as a part of their 1978 study of the federal judicial councils. S. FLANDERS & J. MCDERMOTT, OPERATION OF THE FEDERAL JUDICIAL COUNCILS 52 (1978). Flanders and McDermott also concluded that the initial powers delegated to the councils were adequate, although a problem arose because the judges were occasionally unwilling to use them. *Id.* at 46-52.

20. Pub. L. No. 96-458, § 4, 94 Stat. 2035, 2040 (codified as amended at 28 U.S.C. § 331 (1982 & Supp. V 1987)). The misconduct and disability procedures are codified at 28 U.S.C. § 372(c) (1982 & Supp. V 1987). For an argument that these new provisions have actually done very little to encourage more vigorous enforcement, see Reiger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 EMORY L.J. 45, 93 (1988).

21. For a detailed discussion of the Act's legislative history, see Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 291-308 (1982).

22. Circuit Executives Act, Pub. L. No. 91-647, 84 Stat. 1907 (1971) (codified at 28 U.S.C. §§ 332(e), (f) (1982)). The first decade of experience with circuit executives is discussed in J. MACY, THE FIRST DECADE OF THE CIRCUIT COURT EXECUTIVE: AN EVALUATION (1984).

In 1981 Congress established executive positions on an experimental basis in the five largest districts. Los Angeles was the only district in the Ninth Circuit to qualify. Perhaps because the relationship between the district executive and the court clerk was never made clear, the concept of a district executive never gained a sure foothold. The Senate refused to approve funds for these positions in the 1989 budget, and the Judicial Conference did not appeal the decision. The role of

Confusion and continuing disagreement over the degree to which appellate judges should oversee the administration of the district courts have also fostered council passivity. Even before the adoption of the stronger 1980 legislation, many judges worried that the councils had too much power. Writing in 1978, Stephen Flanders and John McDermott concluded:

> The supervisory powers of judicial councils make many judges uncomfortable, whether they serve on a district court or a court of appeals. Many judges feel that section 332 lacks effective enforcement power, or that it is unconstitutional, or both. Many circuit judges also feel that, whatever their powers under section 332 might be, the unpleasant duties associated with council responsibilities are "not really part of the job" or are not truly part of the judicial system.[23]

The question of council power to discipline judges remains controversial. Congress has never spelled out how council oversight of circuit activities is justified in constitutional terms, probably because the leadership within the judicial branch has always been divided on this issue.[24] Nor has the Judicial Conference come to terms with its own authority to supervise and demand action from the councils.[25]

The make-up of the councils has also discouraged active governance. The appellate judges who sit on the councils have little day-to-day contact with the type of administrative problems that district judges experience, though some can draw upon earlier experience as district judges. The organization of work at each level is very different, appellate judges enjoying considerable insulation from the management problems district judges confront as they struggle to cope with attorneys, litigants, jurors, and the general public in their daily work. The problem of differences in administrative experience is exacerbated by the appellate process, which creates tensions between reviewers and the reviewed.[26] Friendships between some district and appellate judges also complicate circuit governance. Reticence to second-guess the district courts in the administrative realm has therefore seemed the wisest course in the circuit councils.[27]

Evidence of the administrative independence federal district judges enjoy is everywhere. No two judges, it seems, do anything in precisely the same way. Litigators ignore these local idiosyncracies at their peril. Federal

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the district executives is evaluated in W. ELDRIDGE, THE DISTRICT COURT EXECUTIVE PILOT PROGRAM (1984).

23. S. FLANDERS & J. MCDERMOTT, *supra* note 19, at 46; *see also id.* at 15, 26, 47-49.

24. Perhaps the best known example of dissension in the judicial ranks is Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970). The majority never reached the constitutional issue, but it did approve, generally, the exercise of council authority. Black and Douglas, in a vigorous dissent, challenged that authority. *Id.* at 137. Judge Frank J. Battisti recorded a similar opinion of the potential for council overreaching in Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711, 745 (1975). For a description of Judge Battisti's recent battles with his own circuit council, see *Battisti Battling Bench Brethren*, Nat'l L.J., Apr. 3, 1989, at 12, col. 1.

25. For a discussion of the problem in the context of procedures the circuits have developed to deal with complaints of judicial disability and misconduct, see Burbank, *Politics and Progress in Implementing the Federal Judicial Discipline Act*, 71 JUDICATURE 13, 14-16 (1987).

26. "The problem," as one district judge remarked, "is that they grade our papers." *See generally* Carp & Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. PUB. L. 359, 378 (1972).

27. P. FISH, *supra* note 6, at 406.

litigators in one California district, for example, recently compiled a manual documenting differences among district judges in such matters as scheduling procedures, motion practice, alternative dispute resolution programs, and voir dire.[28] The local federal bar, which marketed the volume to finance its activities, reports brisk sales. Lawyers, this California example suggests, have learned to cope with administrative diversity within a supposedly national system of court rules.

B. The Demands of Contemporary Conditions

Judicial governance at the district, circuit, and national levels has thus never really challenged the federal tradition of administrative individualism. The circuit councils and other institutions of governance have had some success in dealing with sharp deviations from acceptable practice and in communicating good ideas, but they are not inclined to mandate consistency across administrative units. The Judicial Conference of the United States, often working through the Administrative Office, has moved into the administrative breach to a limited extent, but it too treads softly in dealing with article III judges.

This approach to governance is solicitous of the independence of judges, but offers the judiciary little protection against charges that it is inefficient and unaccountable for its actions. These concerns take on greater weight in the current environment. The federal caseload is steadily increasing in size and complexity. The make-up of the federal courts' work force is also changing, with managerial and article I personnel taking over some of the tasks formerly performed by article III judges, who are in ever shorter supply relative to the caseload.[29] The federal courts, in short, must manage larger caseloads with fewer resources in a more complex organizational environment.

These increasing demands upon courts have created unprecedented pressures to rationalize and streamline the process of adjudication while preserving individual rights. Coordination, accountability, cost savings, and efficiency have become the watchwords of the new judicial administration.

With pressure to improve administration has come pressure to improve the processes and structures associated with the development of administrative policy. Chief judges, for example, can no longer rely as much on the informal methods they used for resolving problems within the circuit when the organization was smaller and slower. As Russell Wheeler and Charles Nihan report in their 1982 study of administration in the federal circuits:

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28. The District Judges Association first tried to negotiate uniform rules, but gave up after six years. The Lawyer Representative Committee of the Northern District of California then interviewed each judge in the district and compiled a manual. Remarks of Chief Judge James R. Browning, General Session of the Tenth Circuit Judicial Conference (Jackson Hole, Wyo. 1988). *See infra* p. 102, discussing current efforts to achieve greater uniformity in local rules.

29. W. HEYDEBRAND & C. SERON, THE RATIONALIZATION OF JUSTICE: HISTORICAL CHANGE AND INSTITUTIONAL CONTRADICTIONS OF THE AMERICAN JUDICIAL SYSTEM (forthcoming).

> Courts of appeals are in transition from one era to another . . . . The chief judge's personal attention to detail took root when the circuits were smaller and the responsibility for overall supervision was less onerous. Increasingly, chief judges wish to avoid detailed personal involvement in all aspects of circuit business and thus are seeking to delegate much of this responsibility to the circuit executive and to committees of judges . . . . Perhaps the most important impression we have gained from this inquiry is that chief circuit judges are facing a double bind created by the growth in the size of the judiciary, on the one hand, and the desire to maintain traditions of close personal relations with their colleagues, on the other.[30]

Nowhere has the pressure to rethink administrative processes and revamp governing institutions been felt more keenly than in the Ninth Circuit. Unprecedented numbers of cases, of district courts, of judges, and of support personnel have created pressure to split the circuit, which has forced leaders in the Ninth Circuit to take seriously the problems of coordinating a massive judicial enterprise and rendering it accountable to its attentive publics.

Strong circuit governance represents one solution to the problem of mediating between the varied constituencies that make up the circuit. During the James Browning years (1976-88), when the circuit grew rapidly and the pressure to improve the circuit's performance was great, innovation in matters of governance became a key strategy for accommodating the burden of numbers and accountability to the reality of independent, nearly autonomous judges.

III

DEMOCRATIZING CIRCUIT GOVERNANCE

The exclusion of district judges from membership on the circuit councils and the Judicial Conference of the United States never sat well with district judges.[31] The Conference welcomed district judges on its committees from the beginning. Chief Justice Charles Evans Hughes initiated this policy, and it quickly became institutionalized, but there was significant opposition to the idea of extending membership on the Conference itself to district judges.[32]

The effort to achieve representation at both levels began early, with Ninth Circuit district judges playing a leading role in lobbying the Judicial Conference.[33] With Chief Justice Earl Warren's active support, Congress in 1957 finally expanded the membership of the Judicial Conference to include one district judge from each circuit.[34] Selection of the circuit's district judge representative occurs during the annual circuit conference.[35] In most circuits,

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30. R. WHEELER & C. NIHAN, ADMINISTERING THE FEDERAL JUDICIAL CIRCUITS: A SURVEY OF CHIEF JUDGES' APPROACHES AND PROCEDURES 9-10 (1982).

31. P. FISH, *supra* note 6, at 248-54, 380-84. *Cf.* S. FLANDERS & J. MCDERMOTT, *supra* note 19, at 50-51.

32. P. FISH, *supra* note 6, at 274-75.

33. *Id.* at 253.

34. Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476 (codified as amended at 28 U.S.C.A. § 331 (West Supp. 1989)).

35. "The district judge to be summoned from each judicial circuit shall be chosen by the circuit at the annual judicial conference of the circuit . . . and shall serve as a member of the conference for three successive years." 28 U.S.C.A. § 331 (West Supp. 1989). The statute envisions participation

including the Ninth, the position is elective, an exception to the usual rule in the federal courts. These elections also elicit atypical judicial behavior, with district judges campaigning for the post, sometimes with a campaign manager and a platform of issues.

Court of appeals judges were no more anxious to relinquish their monopoly on the circuit councils than they had been to give up full control of the Judicial Conference. No one objected to allowing district judges to attend an occasional meeting as a guest of the council, when their input would be helpful. However, there was strong resistance to the idea that district judges should be on an equal footing with appellate judges in setting circuit policy, particularly if that policy might affect procedures or resources of the court of appeals. Again, a few district judges in the Ninth Circuit were active in the effort to achieve representation, but they were opposed by appellate judges in their own circuit.[36]

A. District Judge Representation: By Invitation Only

During the 1970's the Ninth Circuit, like most others, experimented with various compromises, which fell short of full representation for district judges on the council.[37] In 1972, members of the circuit's District Judges' Association were invited to attend in an "advisory capacity" when the chief judge deemed their presence appropriate.[38] They were generally invited to sit in on part of one or two of the council's eight annual meetings, which occurred in conjunction with meetings of the court of appeals, but a whole year may have passed without a district judge observer attending a single council meeting.[39]

Judge Browning took steps to give the district judges more voice in circuit affairs shortly after he assumed the chief judgeship. In 1976 he instituted a separate organization for the district court judges to voice issues of concern to the district courts, the Conference of Chief Judges of District Courts.[40] In May 1977, in anticipation of eventual district judge participation on the council, he proposed to divide the day-long court/council meetings into two sessions. The morning session would consider problems specific to the court of appeals, such as discussion of the need for additional appellate judges. The afternoon session would concern circuit-wide or district-level issues, such as retirement provisions and circuit conference matters. Two district judge

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by both appellate and district judges. In the Ninth Circuit the district judges elect a candidate, and the appellate judges affirm the selection by an automatic unanimous consent.

36. P. FISH, *supra* note 6, at 382.

37. R. WHEELER & C. NIHAN, *supra* note 30, at 3-4.

38. Resolution of the Judicial Council of the Ninth Circuit, adopted July 12, 1972.

39. Letter from Chief Judge James R. Browning to Chief Judge Bailey Brown (Aug. 30, 1978).

40. By-Laws of the Ninth Circuit Conference of Chief Judges (undated). This conference became the model for biannual gatherings of the magistrates and chief bankruptcy judges and their clerks. Materials distributed for each conference are similar: information on matters pending before Congress, the courts, and the United States Judicial Conference; and updates from the Administrative Office, the Circuit Executive, and relevant committees of the council. The agenda features reports from committees, from the chief judge, and from the circuit executive.

representatives, the president of the District Judges' Association and the chairman of the executive committee of the Conference of Chief (District) Judges, would be invited to the afternoon session as non-voting members.[41]

This proposal met with strong opposition from a few circuit judges, although others supported the move. One judge reported that he was "very much opposed to the idea of permitting district judges to participate in Council sessions" because the presence of the two district judges "would destroy both the efficiency and the collegiality of our Council sessions."[42] The council agreed to divide its agenda, but not to invite the district judges to attend the afternoon sessions on a regular basis.

In an effort to strengthen the circuit as an institution, even at a risk to collegiality within his own court, Judge Browning issued the invitation himself. Judge Browning relied on the authority of the council's 1972 resolution, which left the matter of district judge attendance to the discretion of the chief judge.[43] From that point on, District Judge Spencer Williams, who had organized the District Judges Association, began to attend council meetings regularly as a non-voting observer.

Full membership on the circuit councils was not available to the district judges until 1981, when the Judicial Councils Reform and Judicial Conduct and Disability Act took effect.[44] The Act required councils to include two to three district judge representatives, depending on the number of appellate judges on the council.[45] To appease concerns that the restructured council might be inclined toward too active a role, Congressman Kastenmeier drafted a provision that allowed a circuit to limit the power of its council: "Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council."[46]

The district and appellate judges did not generally agree on the issue of council membership. But the real prospect that Congress might take jurisdiction over judicial misconduct away from the circuits and centralize it in Washington discouraged circuit judges from working actively against representation for district judges. District judges began lobbying for

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41. Memorandum from Chief Judge James Browning to Associates (May 3, 1977). The concept of a dual agenda, with court of appeals business clearly differentiated from council business, was later incorporated into the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 2, 94 Stat. 2035 (codified at 28 U.S.C. § 332(a)(1)(c)(1982)).

42. Memorandum to Associates (May 9, 1977). Another judge responded to the Browning memorandum with "strong reservations" about regular participation by district judges. Memorandum to Associates (May 10, 1977).

43. Letter from Browning to Brown, *supra* note 39. The liaison committee elected to accept Judge Browning's invitation by sending only one of their number to council meetings. *Id.*

44. Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified in scattered sections of 28 U.S.C. (1982)).

45. *Id.* The law required at least two district judges on a council made up of up to five appellate judges, and three district judge representatives in councils with more than six appellate court members (codified at 28 U.S.C. § 332(a)(1)(c) (1982)).

46. 28 U.S.C. § 332(d)(3) (1982) (as amended by § 2(c) of the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035) (codified in scattered sections of 28 U.S.C. (1982)). For a discussion of the legislative history of the Act, see Burbank, *supra* note 21, at 291-308.

representation in May 1977 with a resolution by the Fifth Circuit District Judges' Association calling for equal proportions of district and circuit judges on the councils and requesting action by the Judicial Conference. Judge Elmo Hunter, Chair of the Conference Committee on Court Administration, ordered a study of council activities, which revealed that two-thirds of those affected by council decisions were district judges. Yet most appellate judges opposed any representation for district judges on the councils.[47]

Meanwhile some appellate judges, prompted by the fear that Congress might divest the circuits of power to resolve misconduct complaints, began to work actively for district judge membership on the councils. Congress at that time was considering two bills that would have eliminated council jurisdiction over misconduct, one sponsored by Senator Nunn, the other by Senator DeConcini. Judge J. Clifford Wallace argued for equal numbers of district and appellate judges on councils and election of all representatives in a May 1978 article revealingly entitled *The Nunn Bill: An Unneeded Compromise of Judicial Independence,* and he testified before Congress in support of equal representation in May 1979.[48] Chief Judge Browning also testified in favor of maintaining council authority over discipline, though he did not take a position at that time on the election of representatives or the precise make-up of the councils.[49] However, the steps Browning had taken to include district judge observers on the Ninth Circuit council apparently impressed Representative Kastenmeier and encouraged him to believe that the circuits could operate effectively if council membership were extended to district judges.[50]

B. The Implications of Equality

The Ninth Circuit responded to the 1980 Act by drastically reorganizing its council, a move encouraged by a roughly contemporaneous growth in the already numerous ranks of appellate judges.[51] In most of the other circuits, where the number of circuit judges was much smaller, the councils simply

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47. According to a Nov. 1978 poll, the sentiment on the courts of appeals was more than two-to-one against inclusion; the district judges, on the other hand, were overwhelmingly of the opposite persuasion. The results of the poll showed 81 appellate judges opposed to inclusion and 39 in favor of inclusion. Of the district judges polled, 16 opposed inclusion and 377 favored inclusion. Telephone interview with Judge Elmo Hunter (March 9, 1989).

48. Wallace, *The Nunn Bill: An Unneeded Compromise of Judicial Independence,* 61 JUDICATURE 476, 480 (1978). *See also Judicial Tenure and Discipline, 1979-80: Hearings Before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 96th Cong., 1st Sess. (1979) (statement of Judge J. Clifford Wallace).

49. *Judicial Tenure and Discipline, 1979-80: Hearings Before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 96th Cong., 1st Sess. (1979) (statement of Chief Judge James R. Browning).

50. Telephone interview with Judge Elmo Hunter, *supra* note 47.

51. Judge Browning appointed a committee, composed of three appellate and three district judges with himself presiding, to develop a proposal. *See* Report of the Committee on Restructuring the Circuit Council (Dec. 5, 1980). The matter was debated in council and then put to all judges in the circuit for a vote. The judicial vote was 76 to 3. Minutes of Court and Council Meeting, Dec. 12, 1980.

added two or three district judges to their membership.[52] In the Ninth Circuit, however, if the mandated three district judges had simply been added to a council made up of court of appeals judges, the council would have numbered an ungainly twenty-six.

Equal representation emerged as the unanimous recommendation of the Ninth Circuit Court of Appeals, a surprising result considering the earlier opposition on that court to *any* representation for district judges.[53] Judge Browning defused opposition by chairing the committee charged with implementing the equal representation policy, and by appointing to it the circuit judge who was most opposed to district judge representation.[54] Judge Browning suggested that the committee, which was made up of equal numbers of district and appellate judges, include any protections necessary to ensure acceptance of district judges on the council.

The committee moved quickly to draft a rule that included equal representation, but with the proviso that

> the Council will not intervene in the internal functions of the Court of Appeals or of any district court unless it is determined by a majority of the judges of the particular court or two thirds of the members of the Council that intervention is appropriate and necessary because an impediment to the administration of justice is involved.[55]

However, that stipulation alone did not assuage the concerns of the circuit judges about potential overreaching. The court of appeals instructed the committee to redraft the provision delineating the council's membership to include a definition of a quorum of the council. The committee prepared a new draft requiring a quorum of five, two of whom had to be district judges and two of whom had to be circuit judges other than the chief judge. The revised rule also provided that action on most matters would require a majority of those present, including at least one district judge and one circuit judge other than the chief judge.[56]

The plan, with minor revisions, was submitted to all active article III judges in the Ninth Circuit and was approved seventy-six to three. The final unanimous court of appeals vote took place April 17, 1981, and the new rule took effect the following October.

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52. Neisser, *The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer*, 65 JUDICATURE 143, 144 n.43 (1981).

53. Chief Judge Browning's Report to the 1981 Circuit Conference (June 29, 1981) (reporting unanimous vote from the Court of Appeals for the Ninth Circuit).

54. The committee was appointed on Nov. 20, 1980. It was made up of Judges Robert Browning, J. Clifford Wallace, Joseph Sneed, and Otto Skopil from the court of appeals, and Judges Robert McNichols, Robert Peckham, and Robert Belloni from the district courts. Judge Sneed was a leader in arguing for maintaining exclusivity.

55. The committee thus made mandatory what the legislation left optional. *See* text accompanying note 45. Rule Governing the Restructuring of the Judicial Council of the Ninth Circuit, Provision 1 (Dec. 23, 1980). The rule was amended Mar. 6, 1981, to include only active judges in the tallying of affected judges.

56. Rule Governing the Restructuring of the Judicial Council of the Ninth Circuit, *supra* note 55, Provision 2. The rule required that action on complaints against judges or magistrates be supported by a majority of all members of the council other than the chief judge.

The decision to go beyond congressional requirements and equalize the representation of district and circuit judges had profound implications for governance in the Ninth Circuit. The appellate judges forsook their preeminent role in governing the circuit and became simply one of the two levels represented on the circuit council, accepting a loss of power that some of them predicted would cause serious problems in the governance of the circuit.

Judge Joseph Sneed, who argued against the inclusion of district judges when the matter was before Congress, cast the issue of equal representation in terms of effectiveness.[57] A council that equalized representation of district and circuit judges, he speculated, would please neither group, and would stimulate "oligarchic" tendencies in the council.[58] Emboldened by its district judge representatives, the council would take up issues it had treated as off limits before. Courts would try to deflect the intrusion of the council into their affairs by declaring as many issues as possible to be "court business," thereby avoiding council action. The result would be an ineffective council.

Judge Sneed appears to have been mistaken in anticipating that the presence of district judges on the council would come to be regarded as a mistake, but he was right in identifying their inclusion as a turning point in circuit governance. District judges not only became partners in governance, but their participation on the council pointed the way to further changes. Soon magistrates and bankruptcy judges joined the council as observers. Senior judges noted that they themselves lacked representation and gained observer status. The once heretical idea that those with a stake in the deliberations of the council deserve a chance to participate in those deliberations had within a few years become orthodoxy in the Ninth Circuit.

The reorganization of the council to serve circuit-wide needs encouraged the court of appeals to develop its own institutions for handling issues arising at that level. Judge Browning had laid the groundwork for this understanding in 1977 when he divided the council's agenda into matters of primary concern to the court of appeals and matters of circuit-wide interest. With the reorganization of the council, the court of appeals began meeting separately. In part because of its size, but also because many judges showed no particular interest in administration, the court came to rely on a seven-member executive committee to make both routine and emergency decisions and to evaluate proposals and recommend action to the court.

Splitting the council from the court of appeals also had an impact on the organization of administrative support in the circuit. As the circuit executive's office came to be identified more closely with the council, the circuit executive's relationship with the clerk of the court of appeals began to

57. Judge Sneed presented the arguments against altering the existing structure of the councils in a memorandum circulated to the appellate judges in the summer of 1979. The memorandum was drafted for submission at a congressional hearing, but was never made part of the congressional record.

58. *Id.* at 5.

change. In a sequence of steps typical of the process of institutional reform in the Ninth Circuit, the circuit first experimented with an arrangement by which the clerk took over appeals-related supervisory and procurement functions formerly within the circuit executive's jurisdiction. Then, after discussion in the executive committee of the court of appeals, the judges voted to create a new position, Court of Appeals Executive, "to be responsible for the day-to-day operations of the Court of Appeals."[59]

The effort to define a more active role for the smaller, more representative, circuit council began shortly after the 1981 reorganization. Judge Browning, relying on the management skills of his circuit executive at the time, William E. Davis, initiated many changes in the council.[60] Davis suggested, and the council implemented, quarterly meetings organized around a written agenda. The agenda began with a report by the chief judge on the state of the circuit and included reports of committees and a report from the circuit executive on progress toward objectives outlined in an annual action plan.[61] The specter of a divided circuit motivated both men to develop and implement these reforms. "If the circuit splits," Browning laughingly told Davis one day, "it's your fault."

For Judge Browning, the objective of enhancing the council's effectiveness involved broadening, as much as possible, the base from which the council could draw ideas and suggestions. This meant developing criteria for council membership that would allow for the representation of diverse interests. Arbitrary appointments and politicking for office were to be avoided. The solution was to create a council composed of delegates, with members coming onto the council by virtue of their status or seniority in some separate realm. Thus, three of the circuit judges serve by virtue of their seniority in the administrative units; the Fourth Circuit-judge member represents the Executive Committee of the Court of Appeals. District-judge members are two members of the Conference of District Court Chief Judges selected by seniority as chief judges, the Ninth Circuit's district-judge representative to the Judicial Conference of the United States, and the president of the District Judges' Association.

Observers represent organized constituencies, as do the liaison committees the council created to maintain close contact with key non-judicial officers, such as district court clerks and probation officers. With Judge Browning's encouragement, these constituencies were organized to meet regularly to share ideas and discuss common problems. There has been no

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59. Minutes of Ninth Circuit Council, Nov. 17, 1987, at 2. See Memorandum from Cathy A. Catterson (Court of Appeals Clerk) to Chief Judge Browning (Sept. 28, 1987), and Fiscal Year 1990 Position Requirements, outlining the new court of appeals executive's needs for increased staff.

60. William Davis, who left the Ninth Circuit in 1986, won awards for his earlier work as court administrator for the state of Kentucky. *See* L.A. Daily J., Apr. 6, 1987, § 1, at 1, col. 3. He now serves as director of the Administrative Office of the Courts for California.

61. Davis outlined most of these ideas in a 1981 memorandum to Judge Browning. Memorandum from William E. Davis to James Browning (Aug. 31, 1981). He offered a similar series of organizational proposals to the court of appeals. Memorandum from William E. Davis to James Browning (Mar. 1, 1982).

effort, though, to make such meetings the only source of information about the council; minutes of council meetings are distributed to all judges and available to any member of the Ninth Circuit community. The circuit even has a newsletter, *9th Circuit News*.

The council's work is conducted through a combination of active standing and ad hoc committees. An executive committee handles routine and emergency issues arising between meetings. The committees were encouraged to take their mandates seriously by the requirement that they report regularly to the council. Judge Browning reasoned that the daily press of work on the council judges required the precaution of regular reporting.

In staffing council committees, Judge Browning and the circuit executive's office made an effort to include as many members of the Ninth Circuit community as possible, but especially new judges who could thus become oriented to thinking in terms of the business of the circuit.[62] The development of a wide-ranging, well-populated committee system on the council was also intended to legitimate the council in the eyes of its constituents and to inspire judges, lawyers, and professional staff to think in terms of their circuit and its interests at the national level. Committee jurisdictions and membership were organized to parallel those of the Judicial Conference of the United States, and thereby to ensure that the interests of the circuit would be effectively represented at that level.[63]

Were the council an executive body in a bureaucratic organization, attention to the creation of opportunities for discussion within and across organizational segments might be desirable, but would hardly be perceived as essential to efficient operations. In a court system there are no other options. Orders from a body of legislator-judges, no matter how representative, will be resented by many judges, and resisted completely by a few. Circuit councils have avoided the embarrassment of defiance by issuing few orders.[64]

The leader's task in such a setting is to create opportunities for collegial exchange, to provide information that will be helpful in choosing among alternatives, to engage in friendly persuasion in order to point out the advantages of change or to create embarrassment about failure to conform with expectations, and to protect the institutional interests of the

62. In a 1987 report to chief circuit judges and circuit executives in other circuits, Ninth Circuit Executive Francis Bremson outlined three types of committees on the council: circuit conference committees; conference and liaison committees (reporting on the concerns of the conferences of chief district judges, chief bankruptcy judges, and United States magistrates, and the committees of bankruptcy clerks, district clerks, federal public defenders, and probation officers); and advisory committees and task forces set up to address particular issues of wide concern in the circuit, such as alternative dispute resolution and evaluation of local rules. Bremson noted that "committee members come from every district within the circuit." Memorandum from Francis Bremson on Operating Procedures for the Judicial Council of the Ninth Circuit, at 3 (undated).

63. Chief Judge Browning and the circuit executive also made an effort to have a Ninth Circuit representative on every Conference committee, and anyone in the circuit who was invited to serve on a Judicial Conference committee automatically became a member of the relevant circuit committee. When the Judicial Conference alters its committee structure, as it did in 1988, council committees are adjusted accordingly.

64. P. FISH, *supra* note 6, at 406-26.

organization. Judge Browning nurtured institutions that would assist him in these endeavors, including an historical society to help provide the circuit with a sense of its past[65] and a regional research center.

IV

NINTH CIRCUIT GOVERNMENT IN ACTION

The obvious question is whether Judge Browning's effort to define a meaningful, albeit circumscribed, role for circuit governance has been successful. Judge Browning saw circuit government as a challenge to his skills in persuasion. Judges and other members of the Ninth Circuit community had to be persuaded that the institutions that made decisions on their behalf were legitimate. Skeptics in Washington also had to be persuaded to take circuit government seriously. In their reluctance to undertake unpleasant but necessary regulatory tasks, the circuits had allowed themselves to become almost supernumeraries in the administrative process. As Judge Browning noted in his 1982 report to the Ninth Circuit:

> For forty years the judicial councils of the circuits failed to discharge the responsibilities imposed on them by Congress . . . . But life moves on. The administrative functions left unperformed by the judicial councils were necessarily assumed by others. Over the last forty years administrative authority gradually concentrated in the Judicial Conference of the United States, the Administrative Office, and the Federal Judicial Center.[66]

It would not be easy, Browning warned, to reclaim this authority from Washington.

Has the Ninth Circuit fashioned a meaningful role for itself in an administrative system where power tends to be concentrated in the periphery and the center, but not between the two? The unusual energy and imagination Judge Browning devoted to the task, along with his unusually long tenure as chief judge, suggests that the Ninth Circuit should be considered exemplary in circuit governance. Are the innovations of the Browning period viewed as legitimate and desirable by members of the Ninth Circuit community? What can be learned from this struggle to create a regional judicial polity?

A. The Circuit's Agenda

Governance is a process with no single, easily definable product. At the federal appellate level, however, it is at least possible to discern the tasks of government as defined by Congress and the Judicial Conference and to evaluate how the circuit discharges its mandate. The activities of the circuit council offer a useful starting point for this analysis because it is to the

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65. The Ninth Circuit Historical Society solicits members who are invited to participate in historical scholarship. It also publishes a journal entitled *Western Legal History*.

66. 1982 Annual Report of the Ninth Circuit, at 15. The Federal Judicial Center was founded in 1967 to serve as the Washington-based research and planning arm of the federal court system. Its authority is outlined in 28 U.S.C. § 620 (1968) *See also* Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, LAW & CONTEMP. PROBS., Summer 1988, at 13.

councils that Congress and the Judicial Conference have spoken most clearly. The duties of the councils, contained in a variety of statutory and regulatory provisions, are a product of an accretion of legislation. These duties can be summarized as follows:

- Resolution of complaints of judicial misconduct and certification of judicial disability;
- Intra-circuit dispute resolution;
- Scrutiny and approval of certain administrative proposals emanating from the district courts, including designation of schedules and staff allocations;
- Supervision of the condition of dockets, criminal adjudication, and the use of jurors throughout the circuit, including responsibility to take action to assist a judge who has a large backload of pending cases; and
- Evaluation and recommendation of personnel and equipment needs.

Most of these duties consume relatively little of the Ninth Circuit's collective attention. Judicial misconduct and disability issues, following the pattern elsewhere, are most often handled by the chief judge and court staff and seldom come before the council for action.[67] The dispute resolution function of the council has almost never come into play in the Ninth Circuit, although on one of the few occasions when it did, the issue split the council in half. The four district judge representatives voted unanimously in opposition to the four appellate judge representatives, rendering the vote invalid according to the council's charter, which was designed to short-circuit just such divisions.[68] The council spends more time with required approvals of district plans and proposals (for juror utilization, appointment of assigned counsel, judicial assignments, and so on) and of local rules, but these activities are generally uncontroversial and elicit little discussion.

The council, through its committees, spends much more time on caseload management and personnel issues. Some committees (the task force on alternative dispute resolution, the space committee, and the jury management and utilization committee) are designed to address specific management issues directly; others deal with the organizational prerequisites of an effective system (the intra-circuit assignment committee, and liaison committees with magistrates, bankruptcy courts, and clerks); and still others are concerned with the circuit's resource and information base (the statistics committee and the automation and technology committee). The circuit executive conducts

67. Reiger, *supra* note 20, at 58-59. In 1986, for example, 277 complaints were concluded, 86% by the chief judges. The remaining 39 were dismissed by the judicial councils. *Id.* at 59.

68. At issue was the allocation of space in the Central District of California. A circuit judge had taken space the district judges thought they were entitled to use. The district judges brought the matter to the council repeatedly and in June 1987 sought an order. It was not until after the vote that Chief Judge Browning and the circuit executive realized the vote was in violation of the council's charter. By the next meeting the problem had been resolved.

research on improving caseload flow, and the chief judge and council have not hesitated to ask the Federal Judicial Center to conduct additional studies.

The circuit executive also drafts the annual action plan, which Chief Judge Browning instituted in 1982 to focus the energies of the circuit on problems in the system. The plan is made up of ideas solicited from members of the Ninth Circuit community and, to an even greater extent, of ideas contributed by the professional staff. The plan is designed to encourage the council to become a policymaking, priority-setting body, not just a regulator of functions required by central authorities.

The attention the circuit devotes to studying its caseload helps support the effort to make its needs for personnel and resources known to the Judicial Conference and Congress. Lobbying for additional personnel and equipment has become an art form in the Ninth Circuit. The council is sometimes the nerve center for operations, but other governing institutions within the circuit are also involved in these issues. When the issue of enhanced retirement benefits for magistrates was before Congress, for example, Ninth Circuit magistrates invited the director of the Administrative Office to address them on the subject at their annual magistrates' conference. The director gave them details on the leanings of various members of Congress and urged them to contact their representatives directly. The magistrates also went on record in favor of hiring a professional lobbyist to pursue the matter further.[69]

Externally inflicted threats to the circuit's well-being are also likely to evoke aggressive action from a variety of governing resources. Judge Browning became personally involved in the effort to keep the bankruptcy courts operating after the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,[70] and he worked equally hard to keep the Bankruptcy Appellate Panel in its present form. His style, according to one observer, was to "grab problems by the throat and not let go."

The circuit treads much more lightly when it focuses on the management problems of specific article III judges. When the council learns that a judge has a backlog problem, the chief judge generally contacts the judge and offers assistance. Sometimes, however, the council's statistics committee or a friend on the council may call the judge in question to express concern; often such contacts are made through the appropriate chief district judge. The council has never found it necessary to make formal requests for changes in management practices that allow judges to become seriously in arrears in their work, though the statistics committee has on a few occasions sent a visiting judge to assist in revamping procedures. Intra-circuit assignment policy also encourages timeliness. If a judge has five or more cases under

69. Minutes of Ninth Circuit Magistrates Conference, Sun Valley, Idaho, Aug. 19, 1986. The magistrates and bankruptcy judges were ultimately successful in their efforts to get enhanced benefits in the 100th Session of Congress.

70. 458 U.S. 50 (1982) (holding that Bankruptcy Reform Act's broad grant of jurisdiction to bankruptcy judges violated article III of the United States Constitution).

advisement for sixty days or more, he or she is not available for intra-circuit assignment.

Just getting some judges to report their case disposition statistics is a delicate matter. Many judges ignored reporting requirements until the 1980's, when the chief judge and the council's statistics committee began to press for compliance. Now only a few refuse outright to cooperate, though there are persistent rumors that some judges manipulate their statistics by last-minute assignments of long-pending cases and by other devices. At this writing the council is on the verge of taking a more active role in prodding judges to comply with reporting requirements, and the circuit executive's office is exploring the possibilities of installing a computerized reporting system.

Judges on the Ninth Circuit clearly give each other wide berth to make their own administrative decisions in their own courts. Judicial government works around this major constraint on its activities by emphasizing its role in education, planning, lobbying, and consensus-building, and by handling its regulatory duties with extreme circumspection. That most delicate of regulatory duties, controlling judicial misconduct, is handled informally and in person whenever possible, with the chief judge acting as emissary of the council.

The potentially controversial matter of approving changes in the local rules of constituent courts is also handled with care. Until very recently the council treated approvals as a purely procedural matter of ensuring adequate notice and comment, even though "interdistrict uniformity" is stated as a goal in the advisory committee notes that accompany the relevant section of the Federal Rules.[71] "Uniformity in the federal system," according to one Ninth Circuit judge interviewed in connection with this project, "is the biggest joke going." Congress finally mandated a more thorough review of local rule changes in November 1988.[72] The Judicial Conference has also become involved in the issue; a committee of the conference has proposed amendments to the Federal Rules that would "provide uniform procedures and forms for technical matters which have traditionally been the subject of local rulemaking."[73]

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71. FED. R. CIV. P. 83. Notes of the Advisory Committee on Rules (1985 amendment): "The expectation is that the judicial council will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, *promote inter-district uniformity and efficiency*, and do not undermine the basic objectives of the Federal Rules" (emphasis added).

72. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 403(a)(2), 102 Stat. 4651 (effective Dec. 1, 1988) (current version at 28 U.S.C.A. § 332(d)(4) (West Supp. 1989)). This section specifies that the council shall periodically review the circuit's local rules for conformity to the requirements of the Federal Rules of Civil Procedure.

73. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure, *reprinted in* 124 F.R.D. 431 (1989). The proposed administrative rules would "supersede all previous local rules, orders and other directives promulgated by each court or any judge of the court." *Id.* at 459. The rules cover such matters as format of cover sheets, proof of service requirements, technical pleading rules, and copying requirements.

Commitment to a model of regional judicial government that is primarily facilitative is evident in the Ninth Circuit's efforts to decentralize the budgetary process. Spending for courts traditionally has been handled almost entirely from Washington through the Administrative Office, which negotiates with Congress, sets priorities, and administers the budget. The Administrative Office makes no effort to include the circuits in these decisions. Each circuit executive submits a budget to assist in the process of assessing needs, but these budgets are not used in channeling funds to the circuits, nor is the circuit executive involved in allocations to constituent courts within the circuit. Judges contact the Administrative Office if they need extra office supplies or new furniture, an arrangement that some judges find quite advantageous because the Administrative Office turns down few requests. Several judges I interviewed likened the agency to a sugar daddy who dispenses money from an unseen pocket of unknown depth.

Judge Browning and his circuit executive worked hard to change this system, which they considered inefficient, unreliable, and wasteful.[74] In 1982 the circuit executive proposed a decentralization plan that would place authority for approval of budget requests in the circuit council, and decentralized budgeting became an item in the 1983 and subsequent annual action plans. The idea of decentralized budgeting, stalled at first, has gained ground rapidly in recent years in the Administrative Office and Judicial Conference as Congress has become less generous in its allotments.

It now appears likely that both the district councils and the circuit councils will be loci of distributive authority, and the Judicial Conference will supervise the process. Just how this change will be accomplished remains unclear, for districts and circuits vary in their capacity to ensure that their needs are met. The role of professional administrators in the distributive process also remains unclear, and judges are sharply divided on this issue. "Decisions about who gets what," one judge remarked to me, "should be made by judges." The Administrative Office is currently experimenting with several plans for decentralizing authority over controllable items in the budget, and three Ninth Circuit districts are involved in this experiment.[75]

The campaign to decentralize budgeting and other circuit activities described here reveal the pattern of government during the Browning years. When the circuit's autonomy or resources were threatened, Judge Browning moved decisively to protect local interests. The threat might be long-term, like centralized control over the budget process, or immediate, like the Nunn

74. "Eventually this reform will have its way; it must if the growing judicial establishment is to operate efficiently." Address by James R. Browning, State of the Ninth Circuit (Aug. 13, 1984).

75. The experiment began in Nov. 1987 and is scheduled to run for three years. In the Ninth Circuit it involves the Northern District of California, the Western District of Washington, and the District of Arizona. Outside the Ninth Circuit the Court of Appeals for the Second Circuit, the District Court for the Southern District of New York, and the council of the Eleventh Circuit are participating. The Administrative Office is also decentralizing some building projects, permitting court clerks to make decisions up to $5000, delegating decisions between $5000 and $25,000 to staff in the circuit executive's office, with some council oversight, and requiring full council review of decisions in the $25,000-$500,000 range.

bill. Chief Judge Browning and other leaders worked through the circuit's governing institutions, but it was the energy and talents of a few individuals that lent coherence to the effort.

The approach was much different when the issue was self-regulation. There Judge Browning's persuasive powers were directed at the Ninth Circuit community, not Washington, and the problem was to improve performance, not to precipitate decisive action. In such instances government took on a more institutional, less personal cast, and information-sharing, example, exhortation, and embarrassment were the levers for change.

B. The Consent of the Governed

There is every evidence that the judicial rank and file supported Judge Browning's approach to governance and would have strongly resisted more activist circuit government. In conducting this research I interviewed most of the circuit's chief district judges, as well as an assortment of other district judges, bankruptcy judges, magistrates, members of the circuit executive's office, and other professional personnel.[76] The circuit membership at large, including litigators, was asked to discuss the issue of governance in a series of break-out sessions during the 1988 circuit conference, and notes on each of those sessions were available to me.

A survey of each constituency within the circuit would have added a scientific gloss to this seemingly unsystematic data-gathering procedure. But in estimating what might be learned from such an undertaking, one should take into account the sentiment that predominated in the break-out sessions: Governance is a low-profile, generally benign activity in the Ninth Circuit, despite the elaborate institutional transformation that has occurred there. "The council," as one district judge remarked, "just doesn't seem to influence my life." A chief district judge expressed the same sentiment in a personal interview: "District judges don't worry about administration—until six months before they become chief judge." Fish describes this attitude in his 1973 analysis of administration in the federal courts: "Lower court judges thus may identify generally with the system of which they are a part. Specifically, they relate to their own courts, not to more remote national and

76. Each of the ten chief district judges I interviewed had either sat on the council in the past or was currently serving. Each could thus speak from two vantage points: as a circuit legislator with inside knowledge of the council's work, and as a circuit citizen with district-wide administrative responsibility. These interviews were conducted by telephone in Sept. and Oct. 1988.

Non-judicial personnel interviewed include a member of the staff attorney's office, the clerk of the court of appeals (now circuit court executive), a public defender, the current and former circuit executives, and two members of the current circuit executive's staff. These interviews were conducted during Oct. 14-15, 1987, visits to the Court of Appeals for the Ninth Circuit and District Court for the Northern District of California.

Interviews with non-article III personnel were in person (chief bankruptcy judge and a second bankruptcy judge, Oct. 15, 1987) and by telephone (a magistrate, in Dec. 1988). I also interviewed a senior judge in San Francisco (Oct. 15, 1987).

regional agencies such as the Judicial Conference, its committees, the Administrative Office, or the circuit judicial councils."[77]

The decision to add district judges to the council appears to have satisfied any concern at the district level about the legitimacy of the council as a governing body. Every chief district judge interviewed stressed the significance of the decision to give district judges four slots on the council, but none detected any pressure for more representation, despite what several described as the "natural enmity" between trial and appellate judges.[78] At the break-out sessions, the only criticism of the system voiced by district judges was that the one-year term for district judge representatives was too brief. (Three of the four district judge positions are defined as one-year terms; court of appeals representatives serve for two years.)

Judges on the court of appeals also accept the council as legitimate, perhaps because it has little impact on their everyday lives. As one circuit judge observed: "The cautiousness of the council in approaching issues of governance of the respective courts insures its tranquility and survival."

Ninth Circuit judges display more enthusiasm for the committees of the council, despite the demands committee work places on their time. The judges recently demonstrated their commitment to this form of participation by rejecting a staff proposal to cut back sharply the number of circuit standing committees. Apparently the committee system serves social and educational functions which judges appreciate.

If the attitude toward circuit government among Ninth Circuit district and appellate judges can be described as satisfaction bordering on complacency, the viewpoint of non-article III judicial officers must be characterized in more affirmative terms. The bankruptcy judges and magistrates I interviewed were openly enthusiastic about Browning-era innovations. Judge Browning recognized the significance of these constituencies in the circuit community to a much greater extent than has Congress.[79] Judge Browning offered these groups observer status on the circuit council and membership on council and conference committees. He helped organize specialized conferences for magistrates and bankruptcy judges, provided administrative support, and attended their meetings.

The warmth of his welcome can be discerned in an incident during the annual circuit conference, which Judge Warren Ferguson recalled at a ceremony commemorating Judge Browning's service as chief judge. Judge

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77. P. FISH, *supra* note 6, at 429-30.

78. A recent survey conducted under the auspices of the Ninth Circuit Judicial Council substantiates this observation. District judges were asked about their views of the court of appeals: 95% responded that circuit judges should show greater deference to the trial judge's evaluation of the facts in an appeal; 80% agreed with the suggestion that a circuit judge should sit as a trial judge at least once a year; and 44% noted a lack of collegiality between circuit and district judges. Office of the Circuit Executive, Ninth Circuit Judicial Council Survey of District Court Judges and Attorneys Regarding the U.S. Court of Appeals for the Ninth Circuit 18, 27 (July 1987).

79. Congress failed to provide for full participation of the new bankruptcy judges in circuit affairs. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 96 Stat. 2549 (effective Oct. 1, 1979).

Ferguson was escorting a newly appointed bankruptcy judge to the conference. Upon meeting the new judge, Judge Browning

> knew that he had to devote at least five minutes of his entire attention to that judge . . . . And he did. He did it seriously and truthfully, telling her how proud he was of the bankruptcy courts in the Ninth Circuit. How proud he was of their achievements. How proud he was that she was appointed through a very elaborate program that picked the best. And he was most happy because women were achieving some of their status in the judiciary.[80]

This difference in perspectives between district judges and other judicial officers suggests the importance of article III status in defining roles in the circuit. With that status, an article III judge need not be particularly concerned about how the circuit as a whole operates (though some are). Without it, a judicial officer may have to depend on the organization of the circuit and the leadership of its chief executive officer to overcome the indifference or hostility of article III judges and find a satisfying and effective role.

C. Ninth Circuit Government: An Assessment

Apart from judging, one of my informants observed, judges care only about their space, their personnel, and their creature comforts. If circuit government can help them with these needs, fine. If it purports to tell judges how to judge, on the other hand, it will be universally resented. The judicial and administrative leadership during the Browning era, it seems clear, set its course with these concerns in mind. The leadership was reluctant to interfere in the administrative decisions of judges, but was also unabashed in its activism when the issue was more resources for the circuit.

The activities involved in lobbying for more resources and in administering courts cannot, however, be easily separated. The Ninth Circuit has developed a habit of self-study that serves not just to pinpoint needs, but to create incentives for better practice. The court of appeals, for example, recently commissioned a study to evaluate how its rule regarding unpublished opinions is working.[81] The council's Task Force on Death Penalty Habeas Corpus likewise works from an impressive empirical base that includes information about the number of inmates on death row and the point at which their state remedies will be exhausted.[82]

The Browning legacy of studies and information-sharing also has implications for the distribution of power within and beyond the circuit. The information that can form the basis of persuasive arguments for change is available to all members of the Ninth Circuit community, not just to the

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80. Hon. Manuel L. Real, Chief Judge, presiding, U.S. District Court, Central Dist. of Calif., Remarks of Judge Warren Ferguson during Special Session of Court in Tribute to Chief Judge Emeritus James R. Browning (Dec. 8, 1988) (Reporter's transcript at 37).

81. The judges asked Professor Lauren K. Robel, Indiana Law School, to conduct the study. Her results were published in Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989).

82. Materials for the meeting of the Ninth Circuit Judicial Council, Report of the Task Force on Death Penalty Habeas Corpus (Aug. 1988).

leadership. Such information is a by-product of automation in any large organization: "The same systems that make it possible to automate office transactions," sociologist Shoshana Zuboff has observed, "also create a vast overview of an organization's operations, with many levels of data coordinated and accessible for a variety of analytical efforts."[83] The capacity the Ninth Circuit has developed to gather and disseminate information also has a bearing on the contemporary debate over central versus regional control of resources. The Ninth Circuit is in a better position than many circuits to take over tasks that, up until now, have been within the ambit of the Administrative Office.

The approach to governance Judge Browning attempted to institutionalize exacts a high price in the time and effort required of staff and participating judicial officers. The numerous court, council, and conference committees involve considerable staff work. For judicial officers, active involvement in governance reduces time available for the day-to-day tasks associated with managing court business, the tasks judges identify as their fundamental professional obligation.

There will be pressure to increase the commitment of resources to governance if decentralization of budgeting and associated administration goes further, as seems likely. It is unclear at this writing, however, what role current circuit-wide institutions will play in the process. It is difficult to imagine thoroughgoing decentralization without a significant role for the circuit council, the closest approximation the circuit has to a legislature. Yet if there are hard resource-allocation and enforcement decisions to be made at this level—and especially if those decisions infringe on traditional judicial prerogatives in administration—it can be safely predicted that many judges will resist circuit authority. The Ninth Circuit experience suggests that representation for all constituencies, broad-based participation, and openness in decisionmaking help make circuit-level guidance and information-sharing palatable. But these same facts do not legitimize authoritative action, except where misconduct is egregious. Even within the district courts, any exercise of power by a chief district judge beyond what is strictly necessary for day-to-day operations is unacceptable to some judges.

The issue for the future is whether judicial independence as traditionally understood can survive pressure for more accountability within the judiciary. The threat of a split forced the Ninth Circuit to face this issue earlier than its counterparts. Judge Browning responded with changes designed to improve communications within the circuit and to encourage judges to take administrative concerns seriously. It is impossible to determine how much these innovations in governance contributed to the circuit's improved performance during the Browning period, but it is clear that the Ninth Circuit is better organized than its counterparts to discuss its problems and to plan for its future.

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83. S. ZUBOFF, IN THE AGE OF THE SMART MACHINE 9 (1988).

V

CONCLUSION

The 1939 reformers who created circuit councils and conferences envisioned circuit governance as a bulwark against excessive centralization—and against excessive decentralization—in a national system of justice. Circuit governance has not proven much of a bulwark against either the growth of the Administrative Office or the individualism of judges, even in the Ninth Circuit, where circuit institutions are strongest. Should circuit governance be stronger? Or would the system be better if reform went in the other direction and circuit-level adjudication and administration were decoupled? Each level of the court system could manage its own affairs, with the districts organizing into state-wide associations and hiring their own administrative personnel.

Eliminating the circuits as a significant element in the governance and administration of the federal courts would ease certain tensions in the current system. The logistics of gathering the administrative unit together under one roof would be much simpler. The problem of mistrust between circuit and district judges would be resolved, or at least deferred to national-level institutions. Some administrative problems might be easier to attack in a system where trial and appellate judges met separately and meetings were limited to judicial officers within a single state.

Abolition of circuit-wide institutions would do little, however, to remedy the deficiencies for which the federal courts are criticized most often: costly, slow litigation; toleration of inefficient, irascible, and unfair judges; and failure to confront current problems or plan for the future. When the circuit councils were made up entirely of circuit judges, they demonstrated little interest in these issues in their own courts. There is no reason to expect the situation to be different in associations of district-level judicial officers.

The current system of regional governance also offers certain important advantages. The large regional units are well positioned to make their views heard in Washington—in Congress, the Administrative Office, and the Judicial Conference. The interests of non-article III judicial officers are likely to be better protected in a regional judicial system where these officers can associate by specialty. The chief circuit judge and the circuit executive's office are resources that these newly arrived professionals may be able to use in defining a position for themselves in their districts. A mix of appellate- and trial-level personnel in a circuit council and at annual gatherings may also promote understanding between levels in the system and may promote better decisions when the issue is misconduct and disability in the judicial ranks. In sum, the heterogeneity of the circuit is an argument for its preservation as a unit of governance.

The basic problem, crudely put, is that judges do not want to govern themselves, but they do not want anyone else to do it, either. In this respect judges resemble other professionals in contemporary American society. Judicial reluctance to discipline colleagues and reluctance to assign that task to others is a theme in debates over the role of managerial staff and in the

controversy over whether budgeting should be centralized, regionalized, or carried out at the district level. The inertial tendencies in such a system are formidable. Many of the ideas implemented in the 1970's and 1980's, and some still under discussion, were raised by articulate spokesmen in the 1930's, 1940's, and 1950's. The concepts of a circuit executive, decentralized budgeting, and representation of all judges in circuit governance are examples.[84]

The mechanisms through which judges communicate and deliberate are relevant to the problem of improving court performance even though these institutions are in no position to mandate wholesale change. The Constitution vests Congress with the responsibility to make the law for the federal courts, and our tendency has been to see any change in the litigation process as a matter of constitutional moment. Efforts to keep down costs or speed up adjudication, for example, are bound to be challenged as infringing on due process guarantees and judicial independence. Yet while Congress is the locus of final authority in federal court reform, individual judges typically initiate the process and keep it in motion.

Reform initiatives can be encouraged or discouraged by the organization of governance within the courts. It is helpful, for example, to have a forum to discuss ideas in which the varied constituencies that make up the court system are represented. The dissemination of ideas is easier if the governing system within the courts is perceived as legitimate. Here lies the importance of the Browning legacy. The system of circuit governance that the Ninth Circuit created—however limited in its ability to coerce judges—provides a healthy environment for considering the implications of administrative changes. And the Ninth Circuit is good at making its voice heard in Washington. Committed to the concept of decentralized authority and sensitized to the fierce independence of judges, the Ninth Circuit is bound to star in the drama in which the classic issues of judicial self-governance are debated and transformed.

84. P. FISH, *supra* note 6, at 155.